

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 BRUCE GAGNON and OLYMPIC PENINSULA
4 DEVELOPMENT COMPANY, LLC,

5
6 Petitioners,

7 v.

8 CLALLAM COUNTY,

9
10 Respondent.
11

Case No. 09-2-0004

**ORDER ON CLALLAM COUNTY'S
MOTIONS TO DISMISS**

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13 THIS Matter comes before the Board on two motions of Clallam County to dismiss the
14 Petition for Review (PFR) filed by Bruce Gagnon and Olympic Peninsula Development
15 Company, LLC (Petitioners) on February 19, 2009.

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17 The first motion bases dismissal on Petitioner's failure to timely and properly serve the
18 County with the PFR.¹ The Petitioners filed a response to this motion, requesting the Board
19 deny the County's Motion.²

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21 The second motion bases dismissal on Petitioners' failure to timely challenge the County's
22 actions, as set forth in the issue statement.³ The Petitioners filed a response to this motion,
23 also requesting the Board deny the County's motion.⁴
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26 **I. DISCUSSION**

27 Petitioners challenge the County's adoption of Resolution 124, 2008 (Resolution) on
28 December 23, 2008. With this Resolution, the Board of County Commissioners denied
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31 ¹ County's Motion to Dismiss, filed with the Board on March 23, 2009 (County's 1st Motion).

32 ² Petitioners' Response to Clallam County's Motion to Dismiss @ Improper Serving Upon County, filed with the Board April 22, 2009 (Petitioners' 1st Response).

³ County's Motion to Dismiss [Untimely Appeal], filed with the Board on April 19, 2009 (County's 2nd Motion).

⁴ Petitioners' Response to Clallam County's 2nd Motion to Dismiss @ Untimely Appeal, filed with the Board on April 23, 2009 (Petitioners' 2nd Response).

1 Petitioners' application for a rezone of nine parcels of land, totaling approximately 59 acres,
2 from Urban Very Low Density/Urban Low Density to Industrial in the Port Angeles Urban
3 Growth Area. Denial of the application was based on a failure to demonstrate consistency
4 with all the required criteria for a Comprehensive Plan Land Use and Zoning Map
5 amendment pursuant to Clallam County Code (CCC) 31.08.370 and 33.35.090.⁵
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7 Petitioners filed a PFR with the Board on February 19, 2009. This PFR set forth three
8 questions which were consolidated into a single issue for the Board's resolution.⁶ This
9 issue, as set forth in the Board's Pre-Hearing Order, is:⁷
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11 Is Clallam County in violation of, or non-compliant with, the Growth
12 Management Act (GMA) by failing to provide an adequate supply of industrially
13 zoned land within the Port Angeles Urban Growth Area per RCW 36.70A.115
14 and thereby failing to meet the GMA goal for economic development?

15 Clallam County seeks dismissal of the entire matter based on (1) Petitioners' failure to
16 timely and properly serve the PFR upon the County, and/or (2) Petitioners' failure to timely
17 challenge the County's actions within the 60-day statutory appeal period. The Board will
18 address each of these motions in turn.
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20 A. Failure of Petitioners to timely and properly serve the County
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22 Clallam County contends Petitioners failed to properly serve the PFR on the County as
23 required by WAC 242-02-230. According to the County, Petitioners faxed the PFR to the
24 County Administrator on February 18, 2009. The County asserts WAC 242-02-230, in
25 correlation with the County Charter, requires Petitioners to serve the County Auditor, either
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27 ⁵ Resolution 124, 2008.

28 ⁶ Petitioners' PFR established three bullet-points which questioned: (1) Is Clallam County in violation of the
29 GMA by failing to provide an adequate supply of industrially zoned land within the Port Angeles UGA per RCW
30 36.70A.115 and thereby failing to meet the GMA goal for economic development? (2) Is the Clallam County
31 Comprehensive Plan non-compliant with the GMA? (3) Will the Board direct the Clallam County Board of
32 County Commissioners to bring the County's Compliance Plan into GMA compliance by meeting the
requirements of RCW 36.70A.115 essential for implementing the GMA goal for economic development?
Pursuant to RCW 36.70A.290, the Board issued its Pre-Hearing Order on March 25, 2009. It is the
Prehearing Order which established the issue(s) to be addressed by the Board. WAC 242-02-558(10) permits
objections to this Order; Petitioners did not object to the Board's Prehearing Order.

⁷ March 25, 2009 Prehearing Order. The GMA's goal for economic development is RCW 36.70A.020(5).

1 by U.S. mail or by personal service, no later than the date of filing with the Board.⁸

2 Therefore, because of these errors, the County contends the Petitioners failed to properly
3 serve the PFR and the matter should be dismissed.⁹

4
5 In response, Petitioners argue they properly followed the procedures for filing a PFR as
6 outlined in the Boards' Handbook. Petitioners note they served the County Administrator
7 via facsimile, a "practice more and more commonly acceptable," and the County Auditor did
8 ultimately receive a copy of the PFR.¹⁰ Petitioners contend the County Administrator
9 served as the spokesperson for the County during the re-zone application process and they
10 performed a "good faith effort" in substantial compliance with the technical requirements for
11 service of a PFR.¹¹

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14 Petitioners further contend the facts of this matter are not similar to those present in
15 *Sherman v. Skagit County*. And, according to Petitioners, even if the Board were to dismiss,
16 Clallam County has not given the required publication and/or legal notice of the challenged
17 resolution and Petitioners may still file another appeal.¹²

18 19 **Board Discussion**

20 The Growth Management Act, RCW 36.70A (GMA), does not explicitly require service of a
21 PFR upon the county or city whose action is challenged. However, pursuant to RCW
22 36.70A.270(7), the Growth Management Hearings Boards have adopted rules of practice
23 and procedure. The procedures to be followed in serving a PFR are set forth in WAC 242-
24 02-230(1), which provides: (emphasis added)¹³

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28 ⁸ County's 1st Motion, at 4-5 (citing *Sherman v. Skagit County*, Case No. 07-2-0021, Order of Dismissal (Dec.
29 20, 2007); *City of Tacoma v. Pierce County*, CPSGMHB Case No. 06-3-0011c, Order on Motions (May 1,
30 2006)).

31 ⁹ County's 1st Motion, at 6.

32 ¹⁰ Petitioners' 1st Response, at 1-3.

¹¹ Petitioners' 1st Response, at 4-5.

¹² Petitioners' 1st Response, at 5-6.

¹³ This rule has been in effect since 2004. The Boards amended this WAC provision in 2006, but only to
change the number of copies required to be filed. The Board notes that in 2008, WAC 242-02-230 was
ORDER ON CLALLAM COUNTY'S MOTIONS TO DISMISS

1 (1) The original and four copies of the petition for review shall be filed with a
2 board personally, or by first class, certified, or registered mail. Filings may
3 also be made with a board by electronic mail or telefacsimile transmission
4 as provided in WAC 242-02-240. **A copy of the petition for review shall**
5 **be personally served upon all other named parties or deposited in the**
6 **mail and postmarked on or before the date filed with the board. When**
7 **a county is a party, the county auditor shall be served in noncharter**
8 **counties and the agent designated by the legislative authority in**
9 **charter counties.** The mayor, city manager, or city clerk shall be served
10 when a city is a party. When the state of Washington is a party, the office
11 of the attorney general shall be served at its main office in Olympia unless
12 service upon the state is otherwise provided by law. Proof of service may
13 be filed with the board pursuant to WAC242-02-340.

14 In addition, WAC 242-02-230(2) permits dismissal for failure to substantially comply
15 with the PFR service rule:

16 (2) **A board may dismiss a case for failure to substantially comply** with
17 subsection (1) of this section.

18 The County states, and Petitioners do not dispute, that Clallam County operates under a
19 home rule charter form of government.¹⁴ It further points out that its Charter does not alter
20 the statutory designation of the Auditor as the proper agent of the County to receive service
21 of either lawsuits or appeals, including appeals under WAC 242-02-230.¹⁵

22 Thus, based on WAC 242-02-230, Petitioners were required to serve the PFR upon the
23 County Auditor, either personally or by U.S. mail, on or before February 19, 2009.
24 Petitioners do not dispute that they did not serve the PFR in accordance with these
25 requirements and, even after the filing of the County's Motion, Petitioners did not attempt to
26 conform to these provisions.
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31 amended to permit electronic mail (e-mail) filing of a PFR with the Board. However, provisions related to the
32 service of a PFR on named parties were not amended.

¹⁴ Clallam 1st Motion, at 3.

¹⁵ Id.

1 Petitioners concede they faxed the PFR to Clallam County, contending this is a “practice
2 more and more commonly acceptable.”¹⁶ While this may be a true statement, WAC 242-02-
3 230(1) provides for only two methods of service – personal or U.S. Mail. Petitioners further
4 state the PFR was drafted based on the guidelines articulated in the Board’s Practice
5 Handbook. However, not only is the Handbook intended solely for informational purposes,
6 the Handbook clearly makes no reference to service upon named parties by telefacsimile.¹⁷
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8 In addition, even if the Board were to deem proper the service of a PFR by telefacsimile, the
9 Board’s own rules require that when utilizing electronic mail or telefacsimile transmission
10 such a transmission must be supplemented by a mailing.¹⁸ This parallels the
11 Administrative Procedures Act, RCW 34.05, which permits agencies to adopt a rule
12 authorizing service by electronic telefacsimile but requires simultaneous mailing of copies of
13 the document.¹⁹ The Clallam County Auditor, Patricia Rosand, states that neither she nor
14 her office has been served with, or mailed, a copy of the PFR.²⁰ Petitioners submit no
15 evidence to dispute this fact.
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18 In addition, the faxed PFR was sent to the attention of Mr. Jim Jones, Jr. (County
19 Administrator) at the office of the Board of County Commissioners.²¹ As noted *supra*, it is
20 the County Auditor that is to be served and the County Auditor attested that she has not
21 been served with a copy of the PFR, either personally or via mail.²² As with the mode of
22 service, Petitioners’ do not dispute this fact. Rather, Petitioners assert they served the
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27 ¹⁶ Petitioner’s 2nd Response, at 2.

28 ¹⁷ See e.g. Handbook at Page 2: “This is an informal guide intended to assist ... not exclusive and does not
29 have the force and effect of state law, Board rule, or regulation ... See RCW 36.70A Growth Management Act
30 and WAC 242-02 Board Rules of Practice and Procedures for detailed information;” Handbook at Page 8:
31 “Other named parties to the action must be served personally or via U.S. Mail at the same time or before
32 service on the Board.”

¹⁸ See e.g. WAC 242-02-240(2)(b).

¹⁹ RCW 34.05.010(19).

²⁰ County’s 1st Motion: Exhibit G, Affidavit of Patricia Rosand.

²¹ County’s 1st Motion: Exhibit C, Fax Cover Sheet; Exhibit D, Affidavit of Tammy Sullenger.

²² County’s 1st Motion: Exhibit G, Affidavit of Patricia Rosand.

1 County Administrator because he was the person they had been dealing with during the
2 application process.

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4 Petitioners appear to assert that they substantially complied with the Board's rules in
5 regards to service and therefore their PFR is properly before the Board. However, it is clear
6 from these undisputed facts that the Petitioners did not comply with the requirements of
7 WAC 242-02-230(1). With the exception of the Boards' Handbook, the Petitioners do not
8 allege that they consulted the GMA, the WAC, prior decisions of the Board, or contacted the
9 County in regards to proper service requirements. Nor have the Petitioners attempted to
10 cure their procedural error. The Board cannot construe Petitioners' lack of effort to properly
11 serve the County as "substantial compliance" with the Board's service provisions.²³

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14 **Conclusion:** As the Board noted in the *Sherman* case, although dismissal of a PFR for
15 failure to comply with the Boards' published rules may be harsh, the rules do not make
16 exceptions for *pro se* or novice petitioners. All parties coming before the Board are held to
17 the same standard and must comply with all procedural rules. Here, it is clear that
18 Petitioners have simply failed to comply and, therefore, the County's Motion to Dismiss for
19 failure to properly serve the PFR as set forth in WAC 242-02-230 is GRANTED.

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21 B. Failure of Petitioners to file a timely challenge
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24 ²³ The issue of substantial compliance was recently addressed by the Board in *Sherman v. Skagit County*,
25 WWGMHB Case No. 07-2-0021, Order Dismissing Case (Dec. 20, 2007). In the *Sherman* matter, petitioner
26 faxed a copy of the PFR to the Skagit County Commissioners because it was the Commissioners that took
27 action affecting her property and the County Auditor's office told her that the Auditor had nothing to do with
28 GMA. In finding that the petitioner did not substantially comply with the Board's rules, thereby warranting
29 dismissal, the Board noted that substantial compliance requires a party to make a good faith effort to comply
30 with a technical requirement, which the petitioner in *Sherman* did not do. Similarly, in the Central Puget Sound
31 Board's case of *City of Tacoma v. Pierce County*, CPSGMHB Case No. 06-3-0011c, Order on Motions (May 1,
32 2006), petitioner served the Pierce County Council with the PFR and not the County Auditor despite the
Board's rules and several documents noting service upon the County Auditor.²³ In dismissing the petitioner,
the Central Board noted that despite having received the County's Motion to dismiss prior to the Prehearing
Conference, petitioner made no attempt to correct the faulty service. In contrast, in the Eastern Board, in
Cove Heights Condo Assoc. v. Chelan County, EWGMHB Case No. 08-1-0013, Order on Motions (Sept. 3,
2008) denied the County's motion to dismiss for improper service because petitioners had substantially
complied with the Board's rules when they attempted to serve the County Auditor in a timely manner via a
process server but the process server delayed in actually serving the County Auditor.

1 Since the Board has determined that the Petitioners failed to properly serve the PFR on
2 Clallam County, thereby warranting dismissal of the PFR, the Board need not address the
3 County's second motion seeking dismissal.

4 5 II. ORDER

6 Based upon review of the Petition for Review, the motions, responses, and exhibits
7 submitted by the parties, the GMA, the Boards' Rules of Practice and Procedures, and prior
8 decisions of the Boards, the Board enters the following ORDER:
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- 10 1. Clallam County's Motion to Dismiss for failure to timely and properly serve the
11 Petition for Review upon the County is GRANTED.
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13 2. Case No. 09-2-0004 *Bruce Gagnon and Olympic Peninsula Development Co., LLC v.*
14 *Clallam County* is dismissed in its entirety and closed.

15 DATED this 4th day of May 2009.
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17 _____
18 James McNamara, Presiding Officer

19 _____
20 William P. Roehl, Board Member

21 _____
22 Nina Carter, Board Member

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24 Pursuant to RCW 36.70A.300 this is a final order of the Board.
25

26 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
27 mailing of this Order to file a petition for reconsideration. Petitions for
28 reconsideration shall follow the format set out in WAC 242-02-832. The original and
29 three copies of the petition for reconsideration, together with any argument in
30 support thereof, should be filed by mailing, faxing or delivering the document directly
31 to the Board, with a copy to all other parties of record and their representatives.
32 **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6),

1 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
2 filing a petition for judicial review.

3 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the
4 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
5 judicial review may be instituted by filing a petition in superior court according to the
6 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

7 Enforcement. The petition for judicial review of this Order shall be filed with the
8 appropriate court and served on the Board, the Office of the Attorney General, and all
9 parties within thirty days after service of the final order, as provided in RCW
10 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
11 but service on the Board means actual receipt of the document at the Board office
within thirty days after service of the final order.

12 Service. This Order was served on you the day it was deposited in the United States
13 mail. RCW 34.05.010(19).
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